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5 **IN THE UNITED STATES DISTRICT COURT**
6 **FOR THE DISTRICT OF ARIZONA**

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Kathy Lee Kerner; and Anthony J. Kuc Jr.,

Plaintiffs,

vs.

Deutsche Bank National Trust Company, as
Trustee of the IndyMac INDEX Mortgage
Trust 2007-FLX3, Mortgage Pass-Through
Certificates, Series 2007-FLX3 Under the
Pooling and Servicing Agreement Dated
April 1, 2007,

Defendant.

No. CV-11-8091-PCT-DGC

ORDER

In April 2011, Deutsche Bank National Trust Company filed a forcible entry and detainer action against Kathy Kerner in state court. Doc. 4 at 7-15; *see Deutsche Bank v. Kerner*, No. CV2011-00617 (Ariz. Super. Ct. Apr. 18, 2011). On June 14, 2011, Kerner and Anthony Kuc filed a wrongful foreclosure complaint against Deutsche Bank (Doc. 1) and a “notice of change of venue” purporting to remove the state court action to this Court (Doc. 2).

Deutsche Bank has filed a motion to remand. Doc. 4. No response has been filed. For reasons stated below, the motion will be granted with respect to the state court action and the wrongful foreclosure complaint will be dismissed for lack of jurisdiction.

Federal courts are courts of limited jurisdiction, “possess[ing] only that power authorized by Constitution and statute[.]” *Kokkonen v. Guardian Life Ins. Co. of Am.*,

1 511 U.S. 375, 377 (1994). Pursuant to 28 U.S.C. § 1441, a party “may remove an action
2 to federal court based on federal question jurisdiction or diversity jurisdiction.” *Hunter v.*
3 *Phillip Morris USA*, 582 F.3d 1039, 1042 (9th Cir. 2009); *see* 28 U.S.C. §§ 1331, 1332.
4 The notice of removal in this case asserts both federal question and diversity jurisdiction.
5 Doc. 2 at 2.

6 “It is to be presumed that a cause of action lies outside the limited jurisdiction of
7 the federal courts and the burden of establishing the contrary rests upon the party
8 asserting jurisdiction.” *Hunter*, 582 F.3d at 1042 (citations omitted). Kerner and Kuc
9 have not met their burden.

10 **I. Federal Question Jurisdiction.**

11 The Court has subject matter jurisdiction over cases “arising under” federal law.
12 28 U.S.C. § 1331. It is well established that federal question jurisdiction exists only
13 where the complaint itself establishes that the case arises under federal law. *Franchise*
14 *Tax Bd. of State of Cal. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 10 (1983).
15 Stated differently, “[t]he federal question ‘must be disclosed upon the face of the
16 complaint unaided by the answer or petition for removal.’” *Takeda v. Nw. Nat’l Life Ins.*
17 *Co.*, 765 F.2d 815, 821 (9th Cir. 1985) (quoting *Gully v. First Nat’l Bank*, 299 U.S. 109,
18 113 (1936)).

19 Deutsche Bank’s complaint asserts a forcible entry and detainer claim pursuant to
20 A.R.S. §§ 12-1173 and 12-1173.01. Doc. 4 at 9. Because that claim does not depend on
21 resolution of any issue of federal law, the Court does not have subject matter jurisdiction
22 over the claim under 28 U.S.C. § 1331.

23 Nor does the Court have federal question jurisdiction over the claims asserted in
24 the complaint filed by Kerner and Kuc (which essentially are counterclaims to the
25 forcible detainer action). Kerner and Kuc purport to assert four “claims”: broken chain
26 of title, incorrect real party in interest, defective deed of trust, and invalid assignment.
27 Doc. 1 at 6-11. None of those claims arise under federal law.

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1 **II. Diversity Jurisdiction.**

2 Federal courts possess diversity jurisdiction “where the matter in controversy
3 exceeds the sum or value of \$75,000, exclusive of interest and costs, and is between . . .
4 citizens of different States[.]” 28 U.S.C. § 1332(a)(1). The removing party “bears the
5 burden of proving by a preponderance of the evidence that the amount in controversy
6 exceeds [\$75,000].” *Singer v. State Farm Mut. Auto. Ins. Co.*, 116 F.3d 373, 376 (9th
7 Cir. 1997) (citations omitted). Kerner and Kuc present no evidence, or even an argument,
8 that the amount in controversy exceeds the jurisdictional amount. Nor do they allege
9 facts establishing complete diversity of citizenship. The Court is without diversity
10 jurisdiction over the state court action and the wrongful foreclosure complaint.

11 **III. Conclusion.**

12 Courts strictly construe the removal statute, 28 U.S.C. § 1441, against removal
13 jurisdiction. *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992). This strong
14 presumption against removal means that the removing party always has the burden of
15 establishing that removal is proper, and federal jurisdiction “must be rejected if there is
16 any doubt as to the right of removal in the first instance.” *Id.* Kerner and Kuc have
17 failed to meet their high burden. The Court therefore will grant Deutsche Bank’s motion
18 and remand the forcible entry and detainer action to state court. 28 U.S.C. § 1447(c) (the
19 case shall be remanded if “at any time before final judgment it appears that the district
20 court lacks subject matter jurisdiction”); *see also* LRCiv 7.2(i) (the district court may
21 summarily grant an unopposed motion).

22 “[A] federal court may dismiss *sua sponte* if jurisdiction is lacking.” *Fiedler v.*
23 *Clark*, 714 F.2d 77, 78 (9th Cir. 1983). Indeed, “[i]f the court determines at any time that
24 it lacks subject-matter jurisdiction, the court must dismiss the action.” Fed. R. Civ. P.
25 12(h)(3). The claims asserted in the wrongful foreclosure complaint (Doc. 1) do not arise
26 under federal law, nor does reference to the “United States Constitution, Article II
27 section 2” (*id.* at 2) suffice to establish federal question jurisdiction under 28 U.S.C.
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§ 1331. The complaint fails to establish diversity jurisdiction pursuant to 28 U.S.C. § 1332. The complaint therefore will be dismissed for lack of subject matter jurisdiction.

IT IS ORDERED:

1. Deutsche Bank National Trust Company's motion to remand (Doc. 4) is granted.

2. To the extent it has been removed, the Clerk is directed to **remand** the forcible entry and detainer action, *Deutsche Bank v. Kerner*, No. CV2011-00617 (Ariz. Super. Ct. Apr. 18, 2011), to Mohave County Superior Court.

3. The wrongful foreclosure complaint (Doc. 1) is **dismissed** for lack of subject matter jurisdiction.

Dated this 22nd day of July, 2011.

Daniel G. Campbell

David G. Campbell
United States District Judge